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IN THE

Supreme Court of the United States

October Term, 1961.

No. 813

J. ELROY McCAW and JAMES A. WOOTEN,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioners J. Elroy McCaw and James A. Wooten pray that a writ of certiorari issue to review the final judgment* of the California Supreme Court which denied them review of the California District Court of Appeal's denial of Petition for Writ of Mandate to review trial court's order denying their motion to quash process and to dismiss an action in which they as non-resident individuals were not served personally within the State of California.

*The judgment of the California Court is final on the issue of personal jurisdiction. (*Hartford v. Superior Court*, 47 Cal. 2d 447, 452 (1956); *cf., Madruga v. Superior Court of the State of California, etc.*, 346 U. S. 556, 557 (ftn. 1) (1954).

Opinion Below.

There were no opinions in any of the courts below.

Jurisdiction.

1. The judgment sought to be reviewed was entered on November 29, 1961.

2. On January 17, 1962, the time for filing petition for writ of certiorari was extended to and including April 28, 1962, by Honorable W. O. Douglas, Associate Justice.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U. S. C. Section 1257(3).

4. The grounds upon which jurisdiction is invoked are that the California appellate courts in denying review and the California judiciary in assuming *in personam* jurisdiction of petitioners who were non-resident individuals and who were not personally served in California have decided important questions of federal law which have not been, but should be considered and settled by this Court, and have rendered a decision, on at least one of the questions involved, in a way in conflict with applicable decisions of this Court.

Questions Presented.

1. Did not the final judgment in effect deny petitioners discriminatorily and otherwise their right of review under the laws of California and in violation of the 14th Amendment to the United States Constitution?

2. Did not California violate petitioners' rights under the 14th Amendment to the United States Constitution in that the California Courts assumed jurisdiction *in personam* over non-resident individuals who had

not given prior consent to an action in tort, although they had given such consent to specific actions *ex contractu?*

3. Did not California violate petitioners' rights under the 14th Amendment to the United States Constitution in affording petitioners, one a citizen of Washington and the other a resident and citizen of New York, only 10 days to appear and defend with respect to the Summons and Complaint served in Los Angeles County, California, on petitioners' non-statutory but contractual agent (although a second summons was purportedly served outside of California by mail requiring response within 30 days)?

4. Did not California's assumption of jurisdiction *in personam* over nonresident individuals who had given *prior* consent violate petitioners' rights under the 14th Amendment to the United States Constitution?

Constitutions and Statutes Involved.

(Printed in Appendix)

They are:

1. U. S. Constitution, 14th Amendment, §1
2. California Constitution, Article 6, §2.
3. California Constitution, Article 6, §4.
4. California Constitution, Article 6, §4b.
5. California Constitution, Article 6, §24.
6. California Code of Civil Procedure, §416.1.
7. California Code of Civil Procedure, §416.3.
8. California Code of Civil Procedure, §407, subdiv. 3.
9. California Code of Civil Procedure, §963, subdiv. 1.

Statement of the Case.

The record in this case consists only of the proceedings in the California appellate courts. Under California procedure, the proceedings in the trial court never reached the appellate courts because an alternative writ of mandate was refused (see *infra*).

However, the facts are not in dispute and appear for the most part in the printed "Petition for Hearing" filed with the California Supreme Court, certified to this Court. The undisputed facts follow;

On April 9, 1961, the Union Bank (of Los Angeles, California) entered into an agreement with petitioners, among others, in which Union Bank extended credit to others on the guaranty of petitioners.

Petitioner McCaw was and is a resident of Seattle, Washington (but works mostly in New York). Petitioner Wooten was and is a resident of New York. Paragraph 20 of the agreement, however, provides:

> "National, Howard, McCaw, Wooten, NOKNY and NOKLA and each of them, for the express benefit of Union, hereby agree and by this instrument do consent to the jurisdiction of the courts of the State of California; in any action at law or in equity which may hereafter be commenced by Union arising out of this agreement or arising out of any loan or guaranty transaction heretofore made by and between Union and any of the named parties. Said parties further expressly agreed that service of process may be effected upon them and each of them by any one of the following means:

(a) By personal service of process upon Bertram H. Ross, 453 South Spring Street, Los Angeles, California, who is hereby irrevocably appointed and designated by said persons as their agent for service of process in the State of California; or

(b) By personal service upon the Secretary of State of the State of California. Said persons hereby agree to execute such documents as may be required by said Secretary of State to constitute effective designation of him as an agent for service of process; or

(c) By personal service upon Theodore Sirene of the Corporation Trust Company, 510 South Spring Street, Los Angeles, California, or if at the time that said process is to be served, said Sirene no longer holds the position now held by him, then upon such person as may then occupy such position for Corporation Trust Company, or

(d) Personal service upon the aforesaid named parties or any of them within or outside of the State of California; or

(e) By any other means which, under applicable law, constitutes effective personal service.

It is expressly agreed that in any event and regardless of which of the aforesaid means may be utilized by Union, Union will also serve the aforesaid persons, and each of them by mailing a copy of said process, postage prepaid, certified United States Mail, with return receipt requested, to the following addresses:

Fried, Beck, Tannenbaum, Ruggieri & Field
515 Madison Avenue
New York 22, New York

James A. Wooten
7 Central Park West
New York 23, New York

J. Elroy McCaw
The Highlands
Seattle, Washington

Robert A. Howard
3440 Wilshire Boulevard
Los Angeles, California."

On September 5, 1961, Union Bank, the real party in interest, filed its Complaint, summons being issued on the same day, and service being made purportedly on defendants and petitioners on September 5, 1961, by serving Bertram H. Ross personally in Los Angeles County and by mailing copies of the Summons and Complaint to defendants and petitioners respectively to Seattle, Washington, and New York City, New York, purportedly pursuant to the above quoted provisions of the agreement.

The Complaint attempts to allege three causes of action; the first in declaratory relief regarding three writings [an agreement of April 9, 1961, Ex. B, and two guaranty agreements, Exs. A and C]; the second for non-payment of a note; and the third for conspiracy to defraud. This Third Cause of Action alleges on information and belief that the defendants conspired with a debtor who is not sued and a third party who is not sued to cause the debtor and the third party to submit false accounts receivable, damaging plaintiff in

the sum of $1,931,000.00 general damages, and $500,000.00 punitive and exemplary damages.

Defendants and Petitioners herein timely filed their notice of motion for an order to quash service of summons or in the alternative to dismiss the Third Cause of Action upon the ground that the Respondent lacked jurisdiction over the persons of said defendants and Petitioners in that the defendants were non-residents of the State of California; that service was not made upon them personally in this state; that it was against the public policy of this state to make nonresident individuals defendants amenable to process here notwithstanding their consent prior to the arising in plaintiff of a cause of action; that the nonresident defendants were afforded only 10 days to appear and defend and, therefore, would be deprived of due process of law; and that with respect to the Third Cause of Action for conspiracy to defraud there was no prior consent rendering these nonresident individual defendants amenable to process in this state.

Among other things, Petitioners raised the federal constitutional question of due process in the trial court.

The said Motion to Quash was thereafter argued by the respective parties; it was heard as a question of law only; and an order was entered by the trial court on the 13th day of October, 1961, denying said motion including the alternative for dismissing the Third Cause of Action for Conspiracy to Defraud.

On October 25, 1961, defendants timely filed their petition for Writ of Mandate with the Clerk of the District Court of Appeal, Second District, to compel the respondent to enter an order quashing the purported service of summons on said defendants, or in

the alternative to dismiss the Third Cause of Action herein.

Petitioners raised the federal constitutional question in the District Court of Appeal (*e.g.*, Petition for Writ of Mandate, Par. IV, pp. 3-4, Par. VIII, p. 6, Point II, pp. 4-8, Point III, pp. 8-11, Conclusion, p. 11). On November 2, 1961, said Court without opinion denied the petition.

Its judgment or order simply read:

"The Court:

Petition for Writ of Mandate Denied.

Shinn, P.J."

Thereafter, petitioners timely filed their Petition for Hearing in the California Supreme Court, pointing out in addition to what has been set forth above that the validity of the order below could not be raised by appeal or saved in any pleading since any pleading would forever waive the question of jurisdiction; that serious constitutional questions would arise if petitioners were not entitled to a review of the trial court's order; and that petitioners, therefore, under Section 416.3 of the Code of Civil Procedure, were entitled as a matter of statutory right to an alternative writ.

Petitioners prayed for hearing, but that first an alternate Writ of Mandate be issued (which would have been tantamount to leave to appeal and would have brought up the record in the trial court), and that thereafter a Peremptory Writ be issued command-

ing the trial court to enter an order granting the motion to quash or, in the alternative, dismiss the Third Cause of Action in tort.

Again, Petitioners raised the federal constitutional question even to anticipating the federal question which arose by reason of the denial of hearing or review (*e.g.*, Petition for Hearing, Pars. IX and X, p. 6, Points and Authorities, pp. 9, 10, 13, 16, 17-20, 20-21).

The California Supreme Court denied the petition and in effect denied any review of the trial court's judgment.

The Judgment or order of the California Supreme Court read:

"Petition for hearing Denied.

Gibson
Chief Justice".

On January 4, 1962, Petitioners submitted to the California Supreme Court a proposed certificate that Petitioners had raised federal questions. The Clerk of said court returned said certificate, orally advising counsel that the Court does not make such certifications.

Unless this Court grants review, admittedly the Petitioners must file a pleading and forever waive the jurisdictional issue under the laws of California (*Hartford v. Superior Court*, 47 Cal. 2d 447).

REASONS FOR GRANTING THE WRIT.

1. The Case Presents an Important Federal Question Concerning Petitioners' Right Under the 14th Amendment to Have Reviewed by the California Appellate Courts a Trial Court's Order Disposing Finally a Jurisdictional Issue —an Important Federal Question Either Not Settled by This Court or Which Has Been Decided in Conflict With the Applicable Decisions of This Court.

Petitioners concede that the 14th Amendment to the United States Constitution does not *per se* give them any right to appeal: They urge however that under the circumstances of this case they have been deprived of "the equal protection of the laws" by denial of their right of review either by appeal or by writ.

The California Constitution grants appellate jurisdiction to the District Courts of Appeal (Art. 6, §4b) and the Supreme Court (Art. 6, §4) from the Superior courts. Section 963, sub. 1, of the Code of Civil Procedure provides for appeal from a "final judgment" in an action filed in the superior court.

An order denying a motion to quash as distinguished from an order granting such motion is not an appealable final judgment. The remedy after denial has always been by writ.

In California, the writ is either alternative or peremptory. The alternative writ is only an order to show cause; the peremptory writ is the final order (C. C. P. Sec. 1087).

In effect, the alternative writ is tantamount to granting leave to appeal. Thus the California Constitution requirement (Art. 6, §24) that the appellate court must

state reasons for its decision applies only to peremptory writs and not to alternative writs.

Funeral Directors v. Bd. of Funeral Directors, 22 Cal. 2d 104, 106-107 (1943).

Prior to 1955, the writ in the circumstances of this case was only generally statutory, more or less a codification of common law. Since 1955, the writ of mandate in the circumstances is expressly statutory (C. C. P. Sec. 416.3), and is the sole route petitioners must follow if they are not to waive the jurisdictional question.

In *Hartford v. Superior Court*, 47 Cal. 2d 447 (1956), it was stated:

> "The obvious purpose of sections 416.1 and 416.3 is to permit a defendant to challenge the jurisdiction of the court over his person without waiving his right to defend on the merits by permitting a default to be entered against him while the jurisdictional issue is being determined. (See 1 Witkin, California Procedure, 1955 Statutory Supplement, 17-19.) To achieve this purpose, when relief has been denied in the trial court, it is necessary *that relief be sought* in the appellate court before the time to plead has expired. Otherwise the defendant would be compelled to elect between permitting the entry of a default or waiving the jurisdictional issue by pleading to the merits." (Emphasis added.)

If all the said statute was intended to do was to permit petitioners *to apply* for leave to review (alternative writ), then the decision of the Supreme Court denying leave meant they had to submit to the jurisdiction of the California Courts and could not appeal on jurisdictional grounds from the ultimate judgment.

Thus, petitioners by judicial construction have been denied appeal under the California constitutional (Arts. 4 and 6) and statutory provisions (C. C. P. Sec. 963.1) and "appeal by writ" under express statutory provisions (C. C. P. Sec. 416.3).

It should be noted that the United States Constitution may be violated by a state judiciary in the course of construing an otherwise valid state statute. Thus, since petitioners' only remedy was by writ, the denial of even the alternative writ deprived them of constitutional safeguards.

Cf:

Brinkerhoff—Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 679, 680 (1930).

This Court is not bound by a state supreme court's construction of state law in face of petitioners' claim that such construction denies them rights guaranteed under the 14th Amendment.

Scott v. McNeal, 154 U. S. 34, 45-46 (1894).

In *Williams v. Kaiser,* 323 U. S. 471 (1945), involving a state court's dismissal of a petition for a writ of habeas corpus by a defendant claiming violation of the 14th Amendment by the state court's denial of counsel under state statutes, this Court stated (pp. 473-474):

> ". . . But the right to counsel in cases of this type is a right protected by the Fourteenth Amendment of the federal Constitution. The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated. (Citing case.) And Missouri has not suggested in the

argument before this Court that it provides a remedy other than habeas corpus for release from a confinement under a judgment of conviction obtained as a result of unconstitutional procedure. Neither in the briefs nor in oral argument did Missouri suggest that its habeas corpus procedure (citing statute) is not available in this situation.

"The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true. (Citing case.) Read in that light we think the petition makes a prima facie showing of denial of the constitutional right."

Moreover, we believe that the thrust of this Court's decisions in two cases is that the equal protection clause of the 14th Amendment is violated by discriminatory denial of appeal (a) *per se* and (b) under state statute.

Griffin v. Illinois, 351 U. S. 12 (1956) (Review denied below solely for inability to pay for transcript);

Dowd v. United States, 340 U. S. 206 (1951) (Discriminatory denial below of statutory right to appeal).

We urge that these are the applicable decisions with which the judgment below conflicts.

We recognize that the above cases are restricted to the facts more so than in other cases. Hence we argue

that in any event this Court has not decided, but should decide, the important federal question as to whether nonresident individuals are not deprived of due process or equal protection when the state forum deprives them of the right to appeal at any time on the jurisdictional question; and when although the state statute provides a remedy by writ, they are denied even the alternative writ without the record in the trial court and without hearing.

To any counter-argument that the mere filing of the petition and subsequent summary denial constitutes review, we would say (1) due process and equal protection must mean meaningful review (*Cf. Chessman v. Teets*, 354 U. S. 156 (1957)) and (2) the question is important enough to have a pronouncement from this Court.

2. The Case Presents an Important Federal Question Concerning the Violation of Petitioners' Rights Under the 14th Amendment in That the California Courts Assumed Jurisdiction in Personam Over Non-Resident Individuals Who Had Not Given Prior Consent to an Action in Tort, Although They Had Given Such Consent to Specific Actions ex-Contractu—an Important Federal Question Not Settled by This Court.

The complaint filed in the trial court alleged three causes of action, the first two in contract, the third for conspiracy to defraud.

This Third Cause of Action alleges on information and belief that the defendants conspired with a debtor who is not sued and a third party who is not sued to cause the debtor and the third party to submit false

accounts receivable, damaging plaintiff in the sum of $1,931,000.00 general damages, and $500,000.00 punitive and exemplary damages (Petition for Hearing, pp. 5, 6).

Incidentally, punitive and exemplary damages are awarded in California only in cases "*not* arising from contract" (Civ. Code, Sec. 3294).

Petitioners urged without success below that since petitioners at no time gave any consent to being sued in tort in California, the Third Cause of Action, Conspiracy to Defraud, should have been dismissed for want of jurisdiction.

It is elementary constitutional law that a state cannot ordinarily acquire jurisdiction *in personam* over nonresident defendants without personal service within that state (*Pennoyer v. Neff*, 95 U. S. 714). We urge therefore that petitioners were deprived of due process in having to appear and defend from outside of California a cause of action to which they had not given their prior consent.

Apparently, the only case anywhere which could be cited as remotely applicable affirmatively was cited by plaintiff, to wit—*Adam v. Saenger*, 303 U. S. 59 (1938). There this Court held that a judgment *in personam* could constitutionally be rendered in a *cross-action* against a nonresident plaintiff who filed a complaint in the forum.

Plaintiff argued below that "by a parity of reasoning, the same conclusion applies here. Petitioners having properly subjected themselves to the jurisdiction of the California courts with reference to the first two causes of action, due process is not offended. . . ."

(Answer in Supreme Court of Real party in Interest, p. 15).

Unfortunately for plaintiff's position, however, defendants did not subject themselves to the jurisdiction as did the plaintiff in *Adam v. Saenger, supra.*

Paragraph 20 of the contract [printed in full in the certified record in the Petition for Hearing, Par. III, pp. 2 through 4, and herein *supra* under Statement of the Case] which purports to give consent to service provides that the companies and persons named, including the defendants here, consent to the jurisdiction in any action at law or in equity "arising out of this agreement or arising out of any loan or guaranty transaction."

It is clear that this is *contract* language; nor can "transaction" be taken alone as argued below (Answer, *supra*, p. 14) in the face of the adjective "guaranty."

Unquestionably, the Third Cause of Action is in tort. Plaintiff concedes this by seeking exemplary damages under Civil Code Section 3294 which expressly excludes actions arising from contract.

Moreover, the Third Cause of Action for Conspiracy to Defraud arises neither out of the contract, nor loan nor guaranty transactions. It is not even an action to set aside the contract, loan, or guaranty transactions, or an action for fraud in the inducement to make the contract. It is a plenary action not bearing directly on the contract, the loans, or the guaranty transactions. It alleges a conspiracy in that these defendants agreed to have third parties submit false invoices to plaintiff (Petition for Hearing, pp. 5, 9, 17).

This is a tort not dependent on any contract or loan made to these defendants. If plaintiff has such a cause,

of action against these defendants, it could have been brought alone and without reference to the first two causes of action in contract.

Plaintiff argued below that (1) if the trial court had jurisdiction below with respect to the first two causes, it had jurisdiction below with respect to the third cause since under C. C. P. 427, all three could be joined now or later and that defendants admit this by moving for dismissal of the third cause instead of moving to quash; and (2) there is here a designation of an agent for services of any and all actions including all manner of tort.

The first argument begs the question which is one of jurisdiction, not power or procedure. The statutory rules of joinder cannot expand the contractual consent needed for jurisdiction.

It is true that the *alternative* motion was to dismiss, not to quash; but this was made necessary by plaintiff's procedure. If the trial court had jurisdiction of the first two causes, it is because defendants had given consent and service cannot therefore be quashed as there is no way of splitting the service on the motion to quash. Jurisdiction of the Third Cause of Action is also claimed on the basis of consent. If the trial court ruled there was no consent to jurisdiction of the Third Cause of Action, it had no jurisdiction and the only way to reach the question was not on a motion to quash service in this cause, but on a motion to dismiss the cause over which it had no jurisdiction.

Plaintiff's second argument that the designation of an agent makes defendants amenable to process must also fail. Designation of agents by nonresident indi-

viduals must depend also on consent, there being no statutory authority.*

The consent here is set forth in Paragraph 20 of the contract and is limited, as we have seen, to actions arising out of the agreement, loans, or guaranty transactions. Service on Mr. Ross or by mail was one of several means of making service pursuant to the consent. *The designation of an agent was not a separate and unconnected part of the consent.*

However, plaintiff argued below that apart from contract, defendants' irrevocable designation of Mr. Ross as agent was sufficient to make these defendants amenable to process for any purpose and for any cause of action. If, however, statutes providing in a sense extraterritorial jurisdiction must be strictly construed (*Chesin v. Superior Court,* 142 Cal. App. 2d 360), it would seem to follow that writings providing for substituted service should be construed at least no less strictly.

Please note that with respect to this argument, that is, that the appointment of an agent by nonresident individuals is sufficient *per se,* plaintiff is bound by the applicable 10 day period for the defendants to respond.

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*We have been able to find statutory authority for designation of agents by non-resident individuals only in Section 1018 of the California Code of Civil Procedure which provides for the designation of natural persons in this state to receive service of process by foreign corporations or non-resident individuals incurring tax liabilities in California or resident individuals who incur any liability to the State of California under any tax law of the state and who thereafter leave the state.

As we will see, this is insufficient notice to the defendants to appear and defend and is in violation of their constitutional rights.

There being no opinions in any of the courts below, we have no way of knowing which of plaintiff's arguments found acceptance with the California judiciary. To any argument to this Court, therefore, that conceivably the question turns on the construction of a contract or a question of fact (an argument with which we cannot agree and perhaps which we should not even anticipate), we think it sufficient to cite a case in this Court which involved the question of constitutional (sovereign) immunity from state taxation and the construction of a contract between the Navy and a private contractor. This Court there spoke of the "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest".

Kern-Limerick Inc. v. Scurlock, 347 U. S. 110, 121 (1954).

Cf:

Board of Liquidation v. Louisiana ex rel. Wilder, 179 U. S. 622 (1901).

In the last mentioned case, this Court held it was its duty to exercise independent judgment as to the nature and scope of a contract when its jurisdiction is invoked by the claim that the state court's interpretation violates the 14th Amendment.

3. The Case Presents an Important Federal Question Concerning the Violation of Petitioners' Rights Under the 14th Amendment in That the California Laws Incorporated by the Contract Did Not Afford Defendants Reasonable Notice to Appear and Defend—an Important Federal Question Either Not Settled by This Court or Which Has Been Decided in Conflict With the Applicable Decisions of This Court.

It is likewise elementary constitutional law that non-resident defendants must be afforded reasonable time to appear and defend.

Mullane v. Central Hanover, etc., 339 U. S. 306, 314 (1950);

Roller v. Holly, 176 U. S. 398, 408 (1900);

Wuchter v. Pizzutti, 276 U. S. 12, 24 (1928).

In the instant case, one summons was served in Los Angeles County on defendants' contractual agent requiring response within 10 days and another was served by mail outside of the county and state requiring response within 30 days.

The fact that plaintiff's counsel considered the 30 day period or was agreeable to extending time to appear and defend [Exh. 4 to Answer to Petition in District Court of Appeal] does not meet the constitutional objective of due process. It is the *summons* which must afford the reasonable time (*Mullane, Roller, Wuchter, supra*).

It would seem obvious that defendants ("served" in two ways, one requiring response in 10 days and one requiring response in 30 days) must assume that the plaintiff considers each service effective, and that while

the *choice* may be with plaintiff as to when to take the default, the defendants have no choice, but must respond within the period applicable by any purported valid service. It will be noted that Paragraph 20 of the contract and set forth in the Petition herein provided for the mailing only as an *additional* method, apparently for defendants' benefit.

Plaintiff cannot stultify itself. It made personal service here in Los Angeles of a summons which required them to appear "within 10 days after the service on you of this summons, if served within the County of Los Angeles." True, the summons also read "or within 30 days after service elsewhere." The undisputed fact is that one summons was served within the County of Los Angeles.

As has been noted, the interpretation or generosity of plaintiff's counsel cannot resolve constitutional questions or requirements and that any confusion or ambiguity must be resolved against plaintiff in view of its burden of proof [*Confidential, Inc. v. Superior Court*, 157 Cal. App. 2d 75, 79 (1958).]

We urge that the 10 day period was applicable and that 10 days for nonresidents to appear and defendant was unreasonable and unconstitutional.

Roller v. Holley, 176 U. S. 398, 413, held five days insufficient and cited statutes throughout the United States affording much more notice.

In *Goodrich v. Ferris*, 214 U. S. 71, 80, the Supreme Court did not hold that 10 days' notice in a California probate distribution *in rem* proceeding was unreasonable, but expressly distinguished that case from the *Roller* case, *supra*, on the ground that the *Roller* case involved an *original process*.

To sum up the constitutional requirement: the United States Supreme Court approved the 1900 case of *Roller, supra,* and the 1908 case of *Goodrich. Roller* held five days to be insufficient. *Goodrich* held 10 days to be sufficient only in a probate distribution and in a proceeding *in rem*—but not in a case involving original process.

In this case the agreement (Par. 19) provides that it shall be construed and interpreted in accordance with the laws, both statutory and decisional, of California. In Paragraph 20 of the agreement defendants consented to the jurisdiction of the Courts of California and that service of process might be effected upon them by personal service upon Bertram H. Ross in Los Angeles, in effect requiring them to appear and defend in 10 days (C. C. P. Sec. 407, subd. 3).

And even if plaintiff can ignore that incorporation of California statutory law, and rely on the agreement alone, it faces the insurmountable rule that parties cannot by contract reduce time requirements unreasonably. For example, that the Statute of Limitations cannot be shortened unreasonably, please see:

> *31 Cal. Jur. 2d* 435, Lim. of Actions, Sec. 7;
> *Breeland v. Southern Pacific Company,* 231 F. 2d 576, 578 (C. A. 9, 1955).

The real party in interest argued below that by also making service by mail the 30 day period to appear and defend became applicable. When defendants argued that because of the service in this state personally on the agent defendants were called upon to defend within 10 days, the trial court remarked that this was defendants' problem. We cite this exchange only to point up that if there is a dilemma it cannot be used to deprive defendants of their constitutional rights.

One final point with respect to the constitutional sufficiency of the 10 day period. It was argued below that with airplanes 10 days is more than sufficient to appear and defend. In answer we think it sufficient to say that it is not just the travel time* between Washington and New York, on the one hand, and California, on the other, which is the determining factor. The constitutional test is both "appear and defend" and that means the retaining of an attorney, making him sufficiently acquainted with the facts so that he can appear and defend intelligently. This must be why California statutes provide 30 days for services outside the county (*e.g.*, see C. C. P. 407, subs. 3); and even within California, defendants or respondents are afforded time advantages in discovery legislation. Please see, for example, Section 2016 of the California Code of Civil Procedure which gives to the defendant a 20 day headstart on giving notice of depositions. Compare please the Notes of the Advisory Committee on a similar federal rule reported in 28 U. S. C. A. Rule 26, page 289, as follows:

> "* * * The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit * * *."

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*As in *Roller, supra*, 176 U. S. at p. 408, the time specified "makes no allowance for accidental delays in transit."

4. The Case Presents an Important Federal Question Concerning the Violation of Petitioners' Rights Under the 14th Amendment in That the California Courts Assumed Jurisdiction in Personam Over Non-Resident Individuals Based Only on Prior Consent, Which Question This Court Has Not Settled.

At the outset of this point, we must concede that the few authorities outside of California which have discussed the quesion have ruled or pronounced against the position of the petitioners here.

In California, beginning with *De La Montanya v. De La Montanya*, 112 Cal. 101, and prior to 1940 it had been uniformly held by the California Courts that they could not acquire jurisdiction *in personam* over non-resident defendants without personal service within the state on said defendants.

These decisions were the result of narrow interpretation of *Pennoyer v. Neff*, 95 U. S. 714.

However, in 1940, the United States Supreme Court in *Milliken v. Meyer*, 311 U. S. 457, in deciding with respect to a *statute* "liberalized" the *Pennoyer* Rule. The result of *Milliken* was to permit substituted service *under statute*, provided the statute afforded reasonable opportunity to appear and defend.

For the history of the California decisions and the fact that these statutes giving in a sense extra-territorial jurisdiction must be strictly construed, this Court is referred to—

Chesin v. Superior Court, 142 Cal. App. 2d 360 (1956).

Against this background of reluctantly expanding service and then only by statute, we searched for decisions directly bearing on our question, that is, non-statutory prior consent. We could find only one case—

Frey & Horgan Corp. v. Superior Court, 5 Cal. 2d 401 (1936).

The California Court there after accepting the long established rule against *in personam* jurisdiction of non-residents not personally served in this jurisdiction, held that prior consent was present here by contract reference to the *Arbitration Laws* of this State. In other words, the parties had submitted themselves to a forum outside of the court and in accordance with statutory rules of service in arbitration cases.

That the *Frey* case is considered an arbitration-jurisdictional matter, please see the Reporter's headnotes in that case, 38 California Law Review, and Courts, Key 25 of West's Cal. Digest.

We deem it abhorrent to the public policy of California and violative of State and Federal Constitutions to require *prior* consenting defendants residing long distances from California and not doing business there and who are not the primary obligors to be required to appear and defend in what is to them a foreign forum.

Conclusion.

Petitioners' only and last recourse to save serious constitutional objections to submitting to the jurisdiction of California is to seek out this writ. Unless the petition is granted, this case raising serious jurisdictional and constitutional questions (the first three are of first impression anywhere) will have been decided by a

single California Judge without appellate review in the otherwise enlightened State of California.

California should not be permitted in such offhand fashion to assume *in personnam* jurisdiction over citizens of other states.

The Petition herein should be granted.

Respectfully submitted,

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Of Counsel for Petitioners.

APPENDIX.

1. U. S. Constitution, Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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2. California Constitution, Art. 6, §2.

"* * * In the determination of causes, all decisions of the court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated."

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3. California Constitution Art. 6, §4.

§4. Supreme Court; jurisdiction.

Sec. 4. The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court

to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any District Court of Appeal, or before any justice thereof, or before any Superior Court in the State, or before any judge thereof.

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4. California Constitution, Art. 6, §4b.

§4b. District Courts of Appeal; jurisdiction.

Sec. 4b. The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal, or in justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as may be provided by law; also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before

the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district or before any superior court within his district, or before any judge thereof.

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5. California Constitution, Art. 6, §24.

"* * * In the determination of causes all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and the grounds of the decision shall be stated."

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6. California Code of Civil Procedure, §416.1.

§416.1. Motion to Quash Service for Lack of Jurisdiction. Any defendant or cross-defendant upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead, or within such further time as the court may for good cause allow, a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. The notice shall designate as the time of making such motion a date not more than 10 days following the filing of such notice of motion. In the event of the service and filing of such motion, the time of the moving party to plead to

the complaint or cross-complaint shall be extended, and no default may be entered against him, until the expiration of 10 days following service upon him of written notice of entry of any order of the court denying the motion. Upon good cause being shown, the court may extend the latter 10-day period for an additional period not exceeding 20 days. Neither an application to the court by any defendant or cross-defendant for an extension of time within which to plead, nor the granting of such extension nor entering into a stipulation of the parties for such extension, shall constitute a general appearance by said defendant or cross-defendant.

7. California Code of Civil Procedure, §416.3.

§416.3 Writ of Mandate on Denial of Motion to Quash.—If a motion of a defendant or cross-defendant to quash service of summons, as provided in Section 416.1 of this code, is denied by the court, he may, before pleading, and within 10 days after service upon him of written notice of the order of the court denying the motion, or within such additional time not exceeding 20 days as the court may allow, petition an appropriate appellate court for a writ of mandate directed to the court wherein the action or proceeding is pending requiring the entry of its order quashing the service of summons. If he shall thereupon serve upon the adverse party and file with the clerk of the latter court a notice that he has petitioned for such writ of mandate, his time to plead shall be extended, and no default may be entered against him, for a period of 10 days following written notice of the final judgment in the mandamus proceeding, which time for good cause may be

extended by the court for an additional period of not to exceed 20 days.

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8. California Code of Civil Procedure, §407.

"*Direction, Signing and Sealing Summons.*—The summons must be directed to the defendant, signed by the clerk or *judge*, and issued under the seal of the court. It must contain"

* * *

"3. A direction that the defendant appear and answer the complaint within 10 days, if the summons is served within the county in which the action is brought, *or* within *30* days, if served elsewhere, * * *"

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9. California Code of Civil Procedure, §963.

"*Appealable Judgments and Orders.*—An appeal may be taken from a superior court in the following cases:

1. From a final judgment entered in an action, or special proceeding, commenced in a superior court * * *"